85-695

Supreme Court, U.S.
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OCT 22 1985
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CLERK

CASE NO. 85-

IN THE

Supreme Court Of The United States

1985 TERM

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Defendant-Petitioner,

v.

EVAN D. COLEMAN,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

HOBART A. MCWHORTER, JR.
JOSEPH B. MAYS, JR.

OF COUNSEL:

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Attorneys for Petitioner

22 pp

QUESTION PRESENTED

Whether Ala. Code § 12-22-72 (1975) (the "statute") which imposes a ten percent (10%) affirmance penalty upon defendants, but not plaintiffs, who unsuccessfully utilize the appellate process is unconstitutional under the Fourteenth Amendment to the United States Constitution.

CERTIFICATE OF INTERESTED PERSONS

Counsel of record for Defendant-Petitioner, Illinois Central Gulf Railroad Company, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States certify that the following listed parties have an interest in the outcome of this case:

1. Illinois Central Gulf Railroad Company;
2. Evan D. Coleman;
3. The firm of Rives & Peterson, and the attorneys working for such firm, including Clarence M. Small, Jr.;
4. The firm of Bradley, Arant, Rose & White, and the attorneys working for such firm, including Hobart A. McWhorter, Jr. and Joseph B. Mays Jr.;
5. The Supreme Court of Alabama.

In accordance with Supreme Court Rule 28.1, all affiliates and subsidiaries of Illinois Central Gulf Railroad Company are set forth in Illinois Central Gulf Railroad Company's Application for Stay.

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ILLINOIS CENTRAL GULF RAILROAD COMPANY,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINIONS BELOW

The decision of the Supreme Court of Alabama has not been released for publication in the official reporter, however, a copy is attached hereto as Appendix A. No opinion was issued by the trial court, the Circuit Court of Jefferson County, Alabama.

JURISDICTION

The judgment and opinion of the Supreme Court of Alabama was entered July 19, 1985, Illinois Central Gulf Railroad Company's (ICG) Application for Rehearing was denied August 23, 1985, and ICG's Motion for Partial Stay of Judgment was denied September 23, 1985. These proceedings by the Alabama Supreme Court have upheld the statute which is challenged as contrary and repugnant to the provisions of the Fourteenth Amendment to the United States Constitution.

This Court has jurisdiction to review this case on petition for writ of certiorari pursuant to the provisions of 28 U.S.C. 1257 (3).

STATUTORY PROVISIONS INVOLVED

The Alabama statute (the "statute") involved is Ala. Code § 12-22-72 (1975) which provides as follows:

> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3042; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

The statute is violative of the Fourteenth Amendment of the United States Constitution. The applicable portion of which provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This case was commenced on September 27, 1979 against Illinois Central Gulf Railroad Company (ICG) and two other defendants: Steel City Erection Company, Inc. and Steel City Crane Rentals, Inc. (hereafter "Steel City defendants"). The action arose from an injury the plaintiff sustained when a tree branch fell upon his head, the branch having been knocked from the tree by the boom of a crane.

The case was tried in the Circuit Court of Jefferson County, Alabama. The jury returned a verdict in favor of the plaintiff for $500,000 against ICG, and a verdict in favor of the Steel City defendants. ICG filed a motion for new trial on December 5, 1983, and concurrently the plaintiff filed a motion for new trial with respect to the judgment in favor of the Steel City defendants. These motions were deemed to be denied because ninety days elapsed without a ruling by the trial court.

ICG appealed to the Alabama Supreme Court on April 12, 1984, and the plaintiff also perfected an appeal to the Court on this date. The Alabama Supreme Court without the assistance of oral argument by counsel affirmed the lower court on July 19, 1985. On August 2, 1985, ICG filed an Application for Rehearing. In ICG's Application, ICG pointed out to the Alabama Supreme Court the constitutional implications of applying the statute, and the 10% affirmance penalty without oral argument and in any instance, ICG claimed denial of due process under the Constitution of the State of Alabama and the Fourteenth Amendment to the United States Constitution. The Application for Rehearing was denied on August 23, 1985. ICG filed a Motion for Partial Stay of Execution of Judgment on September 13, 1985.

In the Motion for Partial Stay, ICG argued that application of the 10% penalty pursuant to the statute would contravene the Constitution of Alabama and the Fourteenth Amendment to the United States Constitution. Furthermore, ICG respectfully informed the Alabama Supreme Court that the issue of the constitutionality of the statute was currently pending before the United States Supreme Court in the case of *Aetna Life Insurance Company v. Margaret W. Lavoie and Roger J. Lavoie, Sr.*, Case No. 84-1601, and that a Stay therein had been granted by this Court under Docket No. A-728.

ICG's Motion for Partial Stay was denied on September 23, 1985, wherein the court's only statement was as follows:

> The petitioner having filed his motion for partial stay of execution of judgment, and the same having been duly submitted and considered by the Court,
>
> IT IS CONSIDERED and ORDERED that the motion for partial stay of execution of judgment be, and it is hereby, denied.

Accordingly, ICG has submitted an Application for Stay with the Circuit Justice for the Eleventh Circuit and filed this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

There is a substantial constitutional question as to whether operation of the statute violates a defendant-appellant's rights under the equal protection clause of the Fourteenth Amendment. The statute imposes a penalty of ten percent of a money judgment against all defendants who appeal unsuccessfully to the Supreme Court of Alabama. No similar penalty is imposed upon a plaintiff who appeals unsuccessfully. In the case *sub judice,* the penalty is $50,000.

The equal protection clause of the Fourteenth Amendment to the United States Constitution applies with full force to the rights of a party seeking review in the state appellate courts, *Cf. Evitts v. Lucey,* 469 U.S. -, 105 S. Ct. 830, 83 L. Ed. 2d 821, *Reh. denied,* 105 S. Ct. 1783 (1985), and renders invalid any

state statute that draws irrational distinctions between plaintiff-appellants and defendant-appellants. *Cf. Lindsey v. Normet,* 405 U.S. 56 (1972). In *Lindsey v. Normet, supra,* the court opined that "A state may act to discourage patently insubstantial appeals, if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." 405 U.S. at 78. The statute here involved could hardly be more discriminatory. On its face, the statute applies only to those who are involuntarily brought into court as defendants and unsuccessfully appeal adverse judgments. The statute places no corresponding penalty upon any plaintiff who receives an adverse judgment. Indeed, unsuccessful plaintiffs may litigate again with no other risk than additional attorney's fees (which burden defendants also bear in an appeal). Consequently, the statute applies to only half of the parties involved in the judicial process.

The statute not only arbitrarily excludes plaintiffs from its application, and is thus patently discriminatory, but has uniform application to all unsuccessful defendants appealing a judgment. Consequently, even though the statute's aim is to prevent frivolous appeals, it applies to all defendants who unsuccessfully appeal regardless of the merits of the appeal. Accordingly, this statute could hardly be "reasonably tailored" to any permissible end. Rather, the statute is tailored to an impermissible end, that if discriminating between a party who initiates litigation as a plaintiff and one who responds to it as a defendant.

As the statute is discriminatory and not "reasonably tailored" to achieve its aim, it is unconstitutional as repugnant to the Fourteenth Amendment of the United States Constitution. Accordingly, ICG submits that the $50,000 affirmance penalty in this case infringes upon its right to equal protection under the Fourteenth Amendment.

CONCLUSION

For the important and substantial constitutional issues involved, a writ of certiorari should be issued to review the judgment and opinion of the Supreme Court of Alabama.

Respectfully submitted,

HOBART A. MCWHORTER, JR.

JOSEPH B. MAYS, JR.

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon Clarence M. Small, Esq., c/o RIVES & PETERSON, 1700 Financial Center, Birmingham, AL 35203, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 22nd day of October, 1985.

APPENDIX

APPENDIX

JULY 19, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

83-785	)	
ILLINOIS CENTRAL GULF RAILROAD COMPANY	)	
v.	)	JEFFERSON CIRCUIT COURT
EVAN D. COLEMAN, STEEL CITY ERECTION COMPANY, INC.; STEEL CITY CRANE RENTALS, INC.	)	# CV 79-04021

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Illinois Central Gulf Railroad Company, and Seaboard Surety Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY BEATTY, J. TOLBERT, CJ., MADDOX, JONES AND SHORES, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument (s) herewith set out as same appear (s) of record in said Court. Witness my hand this 11th day of September, 1985.

/s/ ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1985

Evan D. Coleman

83-744 v.

Steel City Crane Rentals, Inc., and
Steel City Erection Company, Inc.

Illinois Central Gulf Railroad Company

83-785 v.

Evan D. Coleman; Steel City Erection Company, Inc.;
Steel City Crane Rentals, Inc.

Appeals from Jefferson Circuit Court

BEATTY, JUSTICE.

These are appeals by defendant Illinois Central Gulf Railroad Company (ICG) and plaintiff Evan Coleman from jury verdicts against ICG and in favor of defendants Steel City Erection Company, Inc., and Steel City Crane Rentals, Inc. The lawsuit resulted when plaintiff was injured by a tree limb broken off by a crane owned by the Steel City defendants and leased to ICG to clear the wreckage of a train derailment. We affirm.

On October 1, 1978, a train derailed near Tuscaloosa. Plaintiff, a car and wrecker foreman employed by ICG, was one of the workmen sent to remove the wreckage. The evidence disclosed that four groups of workmen are needed to clean up after a derailment: carmen, a track crew, a train crew, and a crane crew. ICG owned a crane and employed a crane crew, but at the time of the derailment they were in Meridian, Mississippi. Therefore, ICG contacted the Steel City defen-

dants and leased a crane and crew for the operation. During the work, the boom of the crane struck and broke off a tree limb, which fell approximately 40 feet onto plaintiff's head. Plaintiff incurred medical expenses and suffered permanent physical impairment as a result of the injury.

Plaintiff brought suit against ICG and the Steel City defendants, alleging four counts of negligence. ICG cross-claimed against the Steel City defendants seeking indemnity, and Steel City Erection Company cross-claimed against ICG seeking indemnity. At the close of all the evidence, the trial court granted ICG's motion for directed verdict on the cross-claim filed by Steel City Erection Company. The jury returned verdicts in favor of the Steel City defendants and in favor of plaintiff and against ICG in the amount of $500,000. ICG and plaintiff filed motions for new trial, which were not ruled upon within 90 days.

On appeal, ICG argues that the verdict against it was contrary to the preponderance of the evidence, and thus that it was entitled to a new trial. ICG also maintains that the trial court erred in refusing to give various written charges to the jury. Plaintiff appealed the verdict and judgment in favor of the Steel City defendants solely to retain them as defendants in the event his verdict and judgment against ICG were reversed.

ICG maintains that the jury verdict against it and in favor of the Steel City defendants is against the preponderance of the evidence because the jury necessarily found that the members of the crane crew employed by the Steel City defendants became the "loaned servants" of ICG, making ICG liable for their negligence. ICG contends that the trial court should have decided as a matter of law that the crane operators were servants of the Steel City defendants, not of ICG, at the time of the accident.

In determining whether an employee has become a loaned servant the ultimate test is: Whose work was the employee doing and under whose control was he doing it. *Dumas v. Dumas Brothers Manufacturing Co.*, 295 Ala. 370, 378, 330 So.2d 426, 432 (1976). It is not the actual exercise of control

which is determinative but rather the reserved right to control the employee. *United States Steel Corp. v. Mathews,* 261 Ala. 120, 123, 73 So.2d 239, 242 (1954). Where the work of the employee is part of a large undertaking, mere suggestions as to details necessary for a cooperative effort must be distinguished from actual authoritative direction and control. 261 Ala. at 124, 73 So.2d at 242.

In the present case, there was considerable evidence taken on this issue. The crane crew was employed and paid by Steel City, which in turn billed ICG for the services. Steel City decided which of its employees to send on any particular assignment. If ICG was dissatisfied in the work, it could dismiss the entire crew, but only Steel City could fire one of its employees. The employees testified that they were working for Steel City and assisting the railorad in clearing the tracks. There was evidence that the positioning of the crane and the movement of the boom were decisions left entirely to the crane crew without direction from the railroad supervisors. However, there was also evidence that the ICG employees specified the way in which the line was to be cleared, the location where the crane crew should begin working, the order of the cars to be put back on the tracks, and the time when the crane crew could leave the site. Railroad employees hooked the crane to the cars and signaled when the crane should lift the car. One of Steel City's crane operators testified as follows:

> "Q. All right. Now, when you reported to that job site at Stokes, are you there for—what purpose are you there for when you report to the job site?
>
> "A. To assist the railroad in clearing the line, or picking up the cars, or whatever they want me to do. I am there to do what they want to do. They called for help.
>
> "Q. How long would you stay there?
>
> 'A. Until they released me.
>
> ". . . .
>
> "Q. All right. And who would tell you what you were going to do and when you were going to do it after you got on the job site?

". . . .

"A. Yes, the ICG officials would tell us what to do.

". . . .

"Q. Well, I will ask you this. Did you do anything on this particular job site that you were not instructed to by the ICG railroad officials to do?

"A. No, sir."

There was also evidence from which the jury could infer that the ICG employees worked with the Steel City crane crew in the same manner they would have worked with the ICG crane crew that was unavailable at that time.

Although the question is a close one, there is sufficient evidence from which the jury could have concluded that ICG employees went beyond suggestions for a cooperative effort and exercised supervisory control over the actions of the Steel City crane crew. If reasonable persons can reach different conclusions on the question of whether a servant of one employee has temporarily become the servant of another, it is a question of fact for the jury. *United States Steel Corp. v. Mathews,* 261 Ala. at 123, 73 So.2d at 241-42. A jury verdict is presumed to be correct and will not be reversed unless the preponderance of the evidence against the verdict is so decided as to clearly convince the appellate court that it is wrong and unjust. *Shelby County v. Oldham,* 246 Ala. 626, 627, 89 So.2d 106, 107 (1956). The presumption of correctness accorded a jury verdict is strengthened when the trial court denies a motion for a new trial. *TG&Y Stores v. Atchley,* 414 So.2d 912, 914 (Ala. 1982). Although the motions for new trial were automatically denied under the provisions of Rule 59.1, A.R.Civ.P., the trial court later entered an order purporting to deny the motions.

We hold that the verdict was not manifestly unjust as against the preponderance of the evidence.

ICG contends that the trial court erred in not giving certain requested written charges and explanatory charges to the jury. Requested charge X instructed the jury that the members of the crane crew were not employees of ICG. This charge was not appropriate, since, as we have already held, the loaned servant

issue was a question of fact. After the trial court refused to give charge X, ICG requested the following written charge on the law relating to the loaned servant doctrine:

"JURY CHARGES ON ISSUE OF BORROWED SERVANT DOCTRINE

"The Court charges you as follows with respect to the claim or contention by defendant Steel City Erection that the members of its crane crew were 'loaned to,' and thus considered employees or servants of, defendant Illinois Central on the occasion when plaintiff sustained injuries, and that defendant Illinois Central is accordingly liable for any negligent acts of the crane crew members. Defendant Illinois Central denies that the crane crew members were other than the employees of the Steel City defendants. In determining the question of whether the crane crew members should be deemed to be the servants or employees of defendant Steel City Erection or defendant Illinois Central on the occasion plaintiff was injured, all competent and relevant evidence with respect to this issue should be considered, including facts relating to these questions and rules:

"Whose business was being performed by the crane crew members and under whose ultimate power and control were they operating? In considering the question of control, a distinction should be considered between authoritative direction and control, and mere suggestion as to details or the necessary cooperation where the work furnished is part of larger undertaking.

"Who hired the crane crew members, who paid them, and who had the right to discharge them?

"Was there any consent or acquiescence on the part of the crane crew members to suspend their employ by Steel City Erection and to change and to become the employees of Illinois Central?

"Who had the right to select which individuals would serve as the crane crew members, the power of substitution of the crane crew members, and the power to discharge such persons?

"Who owned, selected and supplied the crane being used by the crane crew members at the time of the accident?

"Consideration may be given to a comparison of the duration of the employment of the crane crew members by Steel City Erectors and the duration of alleged employ by Illinois Central as a factor in where the proper employment relationship exists.

"This issue is a question of fact to be determined by you, based upon the evidence in this case."

The following oral charge given by the trial court, although not couched in the same specific language, sufficiently sets forth the principles of the loaned servant doctrine as they are found in case law:

"You have heard reference to the fact that the Defendant Steel City contends that these three individuals were—different terms have been used, but the net effect of the terms is to say that these three individuals were at the time in question not the agents, servants or employees of Steel City, but rather were the agents, servants or employees of the railroad. Now, I want to give you some instructions which will be helpful in considering this question. It is for you to determine what the relationship between these parties and individuals was. But an employee may be in the general service of another and, nevertheless, with respect to particular work may be transferred with his own consent or acquiescence to the service of a third person so that the employee becomes a servant of the third person with all the legal consequences of the new relation. Whether one who is usually the servant of one master has become specially. and temporarily the servant of another is a question of fact for you ladies and gentlemen to determine. Now, in determining that, you need to answer these questions: Whose work was the servant doing and under whose control was he doing it? And it is the reserved right of control rather than the actual exercise that furnishes the true test of the relationship. He is master who has the supreme choice of control and direction of the servant and whose will the servant represents in the ultimate results and in all details. There must be careful distinguishing between authoritative direction and control and mere suggestion as to details or necessary cooperation where the work furnished is part of the large undertaking. The fact that the borrower gives in-

> formation and direction to the servant as to details of work or the manner of doing it does not make this general servant of the employer the servant of such other person. Where the evidence does not clearly establish who the employer is consideration must be given to the character of the service to be rendered, duration of the employment and the one who is paying the employee."

ICG contends that the charge is defective with respect to the requisite intent of the employee and requested charge Y, which states that the crane crew members must have agreed to suspend their employment with Steel City and become employees of ICG in order to be considered loaned servants. The oral charge quoted above specifically states that an employee "may be transferred with his own consent or acquiescence to the service of a third person." After reviewing the entire charge to the jury, we find that the issues were fairly covered. We cannot reverse for the refusal to give requested written instructions where the same rules of law were substantially and fairly covered in the trial court's oral charge. Rule 51, A.R.Civ.P.

Let the judgment be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, and Shores, JJ., concur.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: _____

EVAN D. COLEMAN

83-744 v.

STEEL CITY CRANE RENTALS, INC., et al.

ILLINOIS CENTRAL GULF RAILROAD CO.
Appellant

83-785 vs.

EVAN D. COLEMAN, ET AL.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Appeal docketed. Future correspondence should refer to the above number.
____ Court Reporter granted additional time to file reporter's transcript to and including
____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
____ Appell___ granted 7 additional days to file briefs to and including
____ Appellant (s) granted 7 additional days to file reply briefs to and including
____ Record on Appeal filed
____ Appendix Filed
____ Submitted on Briefs
____ Petition for Writ of Certiorari denied. No opinion.
xxx Application for rehearing overruled. No opinion written on rehearing.
____ Permission to file amicus curia briefs granted
____

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

SEPTEMBER 23, 1985

83-785

ILLINOIS CENTRAL GULF RAILROAD COMPANY	)	
v.	)	JEFFERSON CIRCUIT COURT
EVAN D. COLEMAN; STEEL CITY ERECTION COMPANY, INC.; STEEL CITY CRANE RENTALS, INC.	)	CV-79-04021

ORDER

The petitioner having filed his motion for par.ial stay of execution of judgment, and the same having been duly submitted and considered by the Court,

IT IS CONSIDERED and ORDERED that the motion for partial stay of execution of judgment be, and it is hereby, denied.

Torbert, C. J., and Maddox, Faulkner, Almon, Shores, Adams, and Houston, JJ., concur.

Jones and Beatty, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument (s) herewith set out as same appear (s) of record in said Court. Witness my hand this 23rd day of September, 1985.

/s/ ROBERT G. ESDALE
Clerk, Supreme Court of Alabama